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Supreme Court, U.S.
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Case No.

IN THE

Supreme Court Of The United States

_____ Term, ____

LANCE LUFKIN,

Petitioner,

v.

CHARLES A. McCALLUM, individually and as President of the University of Alabama in Birmingham; J. A. WOODWARD, individually and as Senior Vice President of the University of Alabama in Birmingham; BLAINE A. BROWNELL, individually and as Dean of the School of Social and Behavioral Sciences of the University of Alabama in Birmingham; JOHN HAMER, individually and as Chairman of the Department of Anthropology of the University of Alabama in Birmingham,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. The case of *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989), did not establish a new legal principle by overruling clear past precedent so as to invoke in shortened statute of limitations cases the retroactivity analysis of *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991).

2. This Court has not overruled *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987), and *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 110 S.Ct. 2323, 110 L.Ed.2d 448 (1990) by its decision in *Beam, supra*, and in *Lampf, Pleva, Lipkind, et al. v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). Therefore, even where a retroactivity analysis is implicated in shortened statute of limitations cases, the equitable analysis of *Chevron Oil* is mandated.

LIST OF PARTIES

The parties to this case in the Court of Appeals were as follows:

LANCE LUFKIN

CHARLES A. McCALLUM, individually and as President of the University of Alabama in Birmingham;

J. A. WOODWARD, individually and as Senior Vice President of the University of Alabama in Birmingham;

BLAINE A. BROWNELL, individually and as Dean of the School of Social and Behavioral Sciences of the University of Alabama in Birmingham;

JOHN HAMER, individually and as Chairman of the Department of Anthropology of the University of Alabama in Birmingham.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES MERITING CERTIORARI	1
OPINIONS BELOW	3
JURISDICTION	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
1. Proceedings In The District Court	5
2. Proceedings In The Court Of Appeals	6
REASONS FOR GRANTING THE WRIT	7
I. The Opinion Below Decided Erroneously An Important Question Of Federal Law Which Should Be Resolved By This Court In Holding That *Owens v. Okure* Automatically Invoked Retroactivity Analysis As To 42 U.S.C. § 1983 Claimants Who Had Relied On The Rule Of Law Applying A Longer Statute Of Limitations To § 1983 Actions So As To Bar Their § 1983 Actions	7
II. The Opinion Below Decided Erroneously An Important Question Of Federal Law Which Should Be Decided By This Court As To Whether *James B. Beam Distilling Co. v. Georgia* Overruled *Chevron v. Huson*	10
CONCLUSION	13
CERTIFICATE OF SERVICE	15
APPENDICES	A-1

TABLE OF AUTHORITIES

Page(s)

American Trucking Association, Inc. v. Smith, 496 U.S. 167, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990) 6, 10

Brinkerhoff Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 454-455, 74 L.Ed.2d 1107 (1930) 10

Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) ..... *passim*

Flast v. Cohen, 392 U.S. 83, 99 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968) 8

James B. Beam Distilling Co. v. Georgia, ___ U.S. ___, 111 S.Ct. 2439, 2445-48, 115 L.Ed.2d 481 (1991) ..... *passim*

Jones v. Preuit & Mauldin, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 474 U.S. 1105, 106 S.Ct. 893, 88 L.Ed.2d 926 (1986) 4, 9

Kendrick v. Jefferson County Bd. of Ed., 932 F.2d 910, 913 (11th Cir. 1991) 1

Kimbrough v. Bowman Transp., Inc., 920 F.2d 1578, 1582-83 (11th Cir.), *vacated on other grounds*, 929 F.2d 599 (11th Cir. 1991) 1

Lampf, Pleva, Lipkind, Prupis, Ambersand, Petigrow v. Gilbertson, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991) ..... *passim*

Lufkin v. McCallum, 956 F.2d 1109 (11th Cir. 1992) 3, 9

McKissick v. Busby, 936 F.2d 520 (1991) 6, 9

Okure v. Owens, 816 F.2d 45, 48-49 (2d Cir. 1987) 8

TABLE OF AUTHORITIES — (Continued)

Page(s)

Owens v. Okure, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989) ..... *passim*

People of Illinois v. Archer Daniels Midland Co., 704 F.2d 935, 941 (7th Cir. 1983) 9

Planned Parenthood of Southeastern Pennsylvania v. Casey, 60 L.W. 4795 (1992) 12, 13, 14

Princeton University v. Schmid, 455 U.S. 100, 102 S.Ct. 867, 869, 70 L.Ed.2d 855 (1982) 8

Saint Francis College v. Al-Khazraji, 481 U.S. 604, 608-609, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987) 6, 10

Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 954, 104 S.Ct. 2839, 2846, 81 L.Ed.2d 786 (1984) 9

Sierra Club v. Morton, 405 U.S. 727, 731-732, 92 S.Ct. 1361, 1364-1365, 31 L.Ed.2d 636 (1972) 8

Singleton v. Wulff, 428 U.S. 106, 113, 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826 (1976) 8

Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) 5, 7, 8

Wilson v. Iseminger, 185 U.S. 55, 62, 22 S.Ct. 573, 46 L.Ed.2d 804 (1902) 10

TABLE OF AUTHORITIES — (Continued)

Page(s)

Statutes:

28 U.S.C. § 1254 (1) 3

42 U.S.C. § 1983 ..... *passim*

Alabama Code § 6-2-34 ..... 3, 4, 6

Alabama Code § 6-2-38 (1) 3, 5, 6

Fourteenth Amendment of the
United States Constitution 3

STATEMENT OF ISSUES MERITING CERTIORARI

The shortening of the limitations period in this case from six to two years was the result of the Eleventh Circuit's interpretation of this Court's decisions in *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989) and *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991). The decision in *Owens* did not shorten the limitations period for the plaintiff before the Court in that case, but instead gave him the benefit of the longest limitations period argued for in that case (three years). The decision in *Owens* also was not a change in law for the parties before the Court. The lower court's rulings were simply affirmed in that case. Thus, there was no conceivable issue of retroactivity in *Owens*, either implicit or explicit.

Two prior rulings construing *Owens* in the Eleventh Circuit held that it would be inequitable to shorten the limitations periods after the plaintiff relied on the well-established longer limitations period. *Kendrick v. Jefferson County Bd. of Ed.*, 932 F.2d 910, 913 (11th Cir. 1991); *Kimbrough v. Bowman Transp., Inc.*, 920 F.2d 1578, 1582-1583 (11th Cir.), *vacated on other grounds*, 929 F.2d 599 (11th Cir. 1991).

The court in the current case stated that it would hold it inequitable to shorten the limitations period after Petitioner justifiably relied on the longer six year period. The court below held, however, that it was *forbidden* to any longer consider the equity of shortening a limitations period because of this Court's decision in *James B. Beam Distilling Co. v. Georgia, supra.* The court below did find that "[a]lthough equitable considerations would favor limiting the retroactive effect of *Owens*, the Supreme Court in *Beam* expressly considered and rejected the use of equitable considerations as a basis for limiting the retroactive effect of a new decision (except, perhaps in the new decision itself)". (A-I-6).

Beam does not restrict the Court of Appeals' consideration of the equity of shortening a limitations period as to particular litigants, and certainly not where this Court's prior decision in

Owens did not shorten the limitations period or involve a change in law for the parties before the Court.

The court below has thus applied *Beam* in an absolutist fashion which produces the exact opposite result from what was intended in *Beam*. Instead of producing equality of results between similarly situated litigants as intended, the Eleventh Circuit has shortened the Petitioner's limitations period on the basis of a decision which gave the original litigant in *Owens* the longer of two limitations periods. Because *Owens* did not involve a change in law for the parties in that case and did not shorten the limitations period for that plaintiff, there was no conceivable application in *Owens* of the retroactivity principles of *Chevron Oil v. Huson* or any consideration of the equities of shortening a limitations period after justified reliance on a well-established longer period. As a result, the limitations period was shortened without any consideration *by any court*, including this one in *Owens*, of the equities of doing so retroactively.

The present retroactivity jurisprudence of the Court as it relates to actions under 42 U.S.C. § 1983 is in a state of confusion. The opinion below by applying the *Owens* case automatically to all pending and unfiled § 1983 claims has taken away the rights of thousands of claimants who relied on the longer statutes of limitations applicable to their claims in such states as Alabama without allowing them the opportunity to present or advocate the position that where the statute of limitations will be shortened by a decision, it should not applied to the parties before the Court in such a case.

The effect of the construction placed on *Owens* and *Beam* in the opinion below is to put a retroactive gloss on *Owens* as to parties not "similarly situated" to those before the Court. This abuse of retroactivity jurisprudence, if not corrected, will soon take all substance from the advisory opinion prohibition of Article III of the Constitution.

The opinion below holds that *Chevron Oil* has been overruled despite repeated statements by a majority of the justices of this Court that such is not the effect of the opinions of this

Court. The destruction of *Chevron Oil* and its progeny removes the bridge between the effect of opinions of this Court implicating the interests of the parties not before the Court and compliance with the advisory opinion prohibitions of Article III of the Constitution. The result of the opinion below thus forces federal courts to make the draconian choice between applying a decision to the parties before the Court and ignoring the equitable reliance interests of thousands of unrepresented litigants and potential litigants or issuing advisory opinions. There is no reason for this Court to impose on itself or the lower federal courts such choices when the time tested bridge provided by *Chevron Oil* and its progeny is available to ameliorate the inequitable effects of the retroactivity jurisprudence of this Court

OPINIONS BELOW

The opinion of the district court is reproduced in Appendix A-II. The Opinion of the Court of Appeals is reported as *Lufkin v. McCallum*, 956 F.2d 1109 (11th Cir. 1992), and is reproduced in Appendix A-I.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The statutes involved are 42 U.S.C. § 1983 and Alabama Code § 6-2-38(1) and 6-2-34, which are reproduced at Appendix A-III.

STATEMENT OF THE CASE

This case was filed on September 20, 1990 by Petitioner, a temporary lecturer at the University of Alabama at Birmingham, who charged a violation of 42 U.S.C. § 1983 on his claim that failure to renew his contract constituted a violation of his

property rights under the due process clause of the Fourteenth Amendment. Petitioner alleges that he received notice of the nonrenewal of his contract on May 21, 1987. The Petitioner further alleges that he consulted an attorney who advised him the statute of limitations applicable to his potential § 1983 claim was six years. This advice conformed to the then existing rule set forth in *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 474 U.S. 1105, 106 S.Ct. 893, 88 L.Ed.2d 926 (1986), that the six year statute of limitations period provided under Alabama law for a trespass to persons, Alabama Code § 6-2-34, applied to § 1983 actions brought in Alabama.

The opinion below erroneously held that the case of *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989),[1] established a new legal principle by overruling clear past precedent and applied *Owens* on the basis of automatic retroactivity, finding that this Court had overruled *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). The result was to shorten the applicable statute of limitations from six years to two years and bar Petitioner's suit. The court held that the effect of *James B. Beam Distilling Co., Inc. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), was to reject the *Chevron Oil* equitable considerations as a basis for limiting the retroactive effect of a "new" decision, except perhaps in the new decision itself. The court's view was that *Beam automatically* precluded it from continuing the prior practice in the Eleventh Circuit of limiting the retroactive application of *Owens* by the use of the *Chevron Oil* analysis.[2] (A-I-6). The court

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[1] The *Owens* case held that the applicable statute of limitations for actions under 42 U.S.C. § 1983 is the residual statute of limitations for personal injuries in the state where the cause of action arose *if* that state has multiple statutes of limitation for personal injury actions *and* the residual statute of limitations embraces, either explicitly or by judicial construction, non-specific personal injury actions. (A-I-5).

[2] The three prong *Chevron Oil* analysis is (1) whether the judicial decision establishes a new legal principle by overruling clear past precedent which litigants could reasonably have relied upon; (2) whether retroactive applica-

also held that the fact that a statute of limitations is at issue does not affect or modify the application of *Beam*, relying on this Court's opinion in *Lampf, Pleva, Lipkind, et al. v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). (A-I-6).[3]

1. Proceedings In The District Court

The district court on November 9, 1990 granted the defendants' Rule 12 (b), Federal Rules of Civil Procedure, motion to dismiss this § 1983 claim on the ground that the action was barred by the applicable Alabama statute of limitations. The district court held that *Owens v. Okure, supra*, "clarified" *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), by holding that the statute of limitations for § 1983 claims is governed by Alabama's general or residual statute of limitations for personal injury actions which, under Alabama law, Ala. Code § 6-2-38 (1), is two years. (A-II-3)[4] The district court applied the three prong test set out in *Chevron Oil Co. v. Huson, supra*, for determining whether or not a court should treat a particular decision as having retroactive effect, and resolved the issue against the Petitioner. (A-II-4, 5) The district court opinion is attached as Appendix A-II.

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tions would enhance or inhibit the purpose behind the decision's rule; and (3) whether retroactive applications would be inequitable. (92 S.Ct. at 355). The court below held that if the *Chevron Oil* analysis was applied to the facts of this case "equitable considerations would favor limiting the retroactive effect of *Owens*". (A-I-6).

[3] The court below overlooked the peculiar circumstances of *Lampf* which probably necessitated the application of the decision to the parties in *Lampf* to avoid the advisory opinion prohibition of Article III of the Constitution.

[4] The district court correctly held that *Owens v. Okure* did not announce a new rule of law, only that it constituted a new "wrinkle" in the law. [App. A-1, pp. 2, 3]. This Court in *Owens* made it clear that its opinion was "fully consistent" with the earlier case of *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (109 S.Ct. at 582, n.12). The Court of Appeals incorrectly assumed without discussion that *Owens* met the test to invoke a retroactivity analysis.

2. Proceedings In The Court Of Appeals

The Eleventh Circuit affirmed on other grounds. The Court of Appeals opinion was based solely on *Beam, supra*, and *Lampf, supra*, both issued after the district court's opinion. The Court of Appeals believed *Beam* "held that if a new rule is applied to the parties in the case in which the rule is announced, then the rule must be applied retroactively to all cases currently pending". The Court of Appeals applied this automatic retroactivity rule and held that *Owens v. Okure* mandated that the Alabama residual personal injury statute of limitations applied to the case. The Alabama residual personal injury statute of limitations is two years, Alabama Code § 6-2-38 (1). The Court of Appeals held this action was time barred by that residual statute. It would not have been barred by the six year Alabama statute for trespass to person, Alabama Code § 6-2-34, previously applied by the Eleventh Circuit to § 1983 actions. The Eleventh Circuit refused to apply the *Chevron Oil* three prong analysis to the determination of whether the *Owens* rule applied to this case, though the court specifically recognized that, "Prior to *Beam*, the view of this Circuit clearly supported giving *Owens* only limited retroactive applications". (A-I-4).[5] The Court of Appeals opinion is attached as Appendix A-II.

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[5]The Eleventh Circuit assumes that the Court intended to *sub silentio* overrule *Chevron Oil Co. v. Huson, supra*; *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608-609, 107 S.Ct. 2022, 2025-2026, 95 L.Ed.2d 582 (1987), and *American Trucking Associations, Inc. v. Smith*, 110 S.Ct. 2323 (1990), and the long line of cases which preceded them. Such an assumption is unjustified and is contrary to the decision in *McKissick v. Busby*, 936 F.2d 520 (11th Cir. 1991), applying the *Chevron Oil* analysis over a month after *Beam* was issued.

REASONS FOR GRANTING THE WRIT

I. The Opinion Below Decided Erroneously An Important Question Of Federal Law Which Should Be Resolved By This Court In Holding That *Owens v. Okure* Automatically Invoked Retroactivity Analysis As To 42 U.S.C. § 1983 Claimants Who Had Relied On The Rule Of Law Applying A Longer Statute of Limitations To § 1983 Actions So As To Bar Their § 1983 Actions

Owens v. Okure, supra, does not state a new legal principle overruling clear past precedent. Therefore, no retroactivity analysis of any kind is implicated in this case.[6] A court must make a *Chevron Oil* analysis, whether it is called by that name or not, as to the first prong of the *Chevron Oil* test, i.e.: whether the judicial decision in question established a new legal principle overruling clear past precedent, in order to determine whether a retroactivity issue is even implicated.

This Court did not announce a new legal principle overruling clear past precedent in *Owens v. Okure* for several reasons, primarily the simple fact that this Court stated in the *Owens* opinion that it was not overruling the clear past precedent of *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (*Owens*, 109 S.Ct. at 582 n.12). Moreover, *as to the parties before the Court, Owens* did not even declare a new "wrinkle". *Owens* affirmed rulings by the district court and by the Second Circuit Court of Appeals. (*Owens*, 109 S.Ct. at 582). Thus, *as to the parties before the Court, Owens* merely affirmed the law which had always been applicable to those parties. The decision in *Owens* resulted in the application of the longer of the possible statutes of limitations where the *Owens'* claim would have been barred otherwise.

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[6] It is clear from *Beam* that the retroactivity analysis of *Chevron Oil Co. v. Huson, supra*, must be utilized when a court makes its initial determination as to whether or not to apply a decision to the parties before the court when a new legal principle overruling clear past precedent is announced. (*Beam*, 111 S.Ct. 2448).

Justice Marshall made it clear that *Owens* did not overrule *Wilson v. Garcia, supra*, and confirmed that the *Owens* opinion was fully consistent with the Court's earlier opinion in *Wilson*. (*Owens*, 109 S.Ct. 582, n.12) *Wilson* rejected resort to the residual statute of limitations *in the first instance*. That position is maintained in the *Owens*' decision. Moreover, the Second Circuit in its opinion in *Okure v. Owens*, 816 F.2d 45, 48-49 (2nd Cir. 1987), affirmed on the basis that the initial analysis mandated by *Wilson* had proved futile and that as a result resort to the residual statute of limitations was mandated.

It may be true that the decision in *Owens* was a "new rule of law" as to some parties *who were not before the Court* in that case, but this is not sufficient to implicate a retroactivity analysis. It is surely clear that the jurisdiction of this Court is limited by the "cases or controversies" provision of Article III of the Constitution to deciding issues as to which there are adverse parties actually before it. *Princeton University v. Schmid*, 455 U.S. 100, 102 S.Ct. 867, 869, 70 L.Ed.2d 855 (1982); *Sierra Club v. Morton*, 405 U.S. 727, 731-732, 92 S.Ct. 1361, 1364-1365, 31 L.Ed.2d 636 (1972); *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968). In any event, retroactivity must be limited to litigants "similarly situated" to those before the Court, or this Court would be in the business of issuing advisory opinions.[7]

This Court has repeatedly recognized that federal courts should not resolve a controversy, even one within their constitutional power to resolve, affecting the rights of third persons not parties to the litigation. *Singleton v. Wulff*, 428 U.S. 106,

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[7] The key to Justice Souter's plurality opinion in *Beam* on this point is as follows:

> "Of course, the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent *but similarly situated*." (emphasis supplied) (111 S.Ct. at 2448).

113, 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826 (1976), and *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 954, 104 S.Ct. 2839, 2846, 81 L.Ed.2d 786 (1984).[8] As stated in *People of Illinois v. Archer Daniels Midland Co.*, 704 F.2d 935, 941 (1983), "The term 'advisory opinion' is often just a conclusion; it is what you call a decision that does not resolve an actual case or controversy".

When the Petitioner's claim arose, the Eleventh Circuit applied the Alabama statute of limitations governing trespass to persons to § 1983 actions, rather than the residual statute of limitations for personal injury. *Jones v. Preuit & Mauldin*, 763 F.2d 1220 (11th Cir. 1985). This rule of law was in favor of *Lufkin*. The rule applied in *Owens* that New York's residual statute of limitations controlled § 1983 actions in the Second Circuit was favorable to the plaintiff, Owens. Therefore, the issues of reliance and equities for Owens were certainly not the same as those issues for Petitioner so that the Petitioner could not be considered "similarly situated" to Owens.

This point was not considered in the opinion sought to be reviewed. Moreover, a panel of the Eleventh Circuit issued a decision in *McKissick v. Busby*, 936 F.2d 520 (1991) more than a month after the *Beam* decision was issued holding that the *Chevron Oil* analysis remained applicable to § 1983 statute of limitations problems in causes of action arising before *Owens*.[9]

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[8] Both these cases stress that parties with the interest to be decided should be before the Court to insure the vigorous advocacy necessary to effective judicial decision making. In *Singleton* the Court stresses that, "the courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocate of those rights are before them". (96 S.Ct. at 2874, 428 U.S. at 113). This doctrine, sometimes referred to as the "prudential-standing limitation" rule, is recognized in *Munson* as "not completely separable from Article III's requirement that a plaintiff have a 'sufficiently concrete interest' in the outcome of [the] suit to make it a case or controversy". (104 S.Ct. at 2846, n.5, 467 U.S. at 954, n.5).

[9] The court erroneously stated in the opinion below that the *Beam* decision intervened between the *McKissick* opinion and his opinion in this case. (A-I-5). That is simply wrong. *Beam* was issued on June 20, 1991 and the *McKissick* opinion was issued on July 22, 1991. It is extremely doubtful that the excel-

McKissick was rendered eleven months after Petitioner filed suit and decided the precise question at issue in this case, reaching the opposite conclusion as to the applicability of the *Chevron Oil* analysis. Application of the *Chevron Oil* analysis to this case would have been resolved by the Court of Appeals in favor of the Petitioner. (A-I-6).[10]

II. The Opinion Below Decided Erroneously An Important Question Of Federal Law Which Should Be Decided By This Court As To Whether *James B. Beam Distilling Co. v. Georgia* Overruled *Chevron v. Huson*

However, even if the plaintiff is in error as to whether *Owens* announced a new legal principle overruling a clear past precedent applicable to the case, the decision of this case must still be governed by the *Chevron Oil* analysis. This Court has in a long line of cases applied a different standard for retroactivity analysis insofar as it affects shortened statutes of limitations. This long line of authority includes *Chevron Oil* and *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 609, 107 S.Ct. 2022, 2025-26, 95 L.Ed.2d 582 (1982), *Wilson v. Iseminger*, 185 U.S. 55, 62, 22 S.Ct. 573, 46 L.Ed. 804 (1902), *Brinkerhoff-Fairs Trust & Savings Co. v. Hill*, 281 U.S. 673, 681-682, 50 S.Ct. 451, 454-455, 74 L.Ed. 1107 (1930), and *American Trucking Association, Inc. v. Smith*, 496 U.S. ___, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990).[11]

The court took the position in the opinion below that the combination of *Beam* and *Lampf* overruled this line of cases and *Chevron Oil*. The court thus applied automatic retroactivity

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lent judges deciding *McKissick* were not aware of *Beam* given the widespread interest in that decision in the legal community.

[10] It is difficult to understand how it can reasonably be argued that the Petitioner was not entitled to rely on the *Chevron Oil* analysis since eleven months after he filed suit and one month after *Beam* was issued the Eleventh Circuit was still relying on that analysis. None of these critical reliance issues were represented in *Owens* by parties "similarly situated".

[11] In fact, in the *American Trucking Associations*, case decided in 1990, eight Justices reaffirmed their support of this rule.

without any equity analysis. The Petitioner submits this was an incorrect analysis of the effect of *Beam* and *Lampf*.

Beam is inapplicable to the *Owens* decision because: (1) there was no occasion in *Owens* to apply the *Chevron Oil* analysis to the parties before the Court since the Court merely affirmed the District Court and the Court of Appeals, and (2) there could be no *first instance Chevron Oil* analysis as to the retroactivity equities in *Owens* since the decision did not apply unfavorably to the plaintiff. Moreover, the *Lampf* opinion did not make the required *Chevron Oil* analysis, but clearly applied the "new rule of law" to the parties in that case in order to avoid the advisory opinion prohibitions of Article III of the Constitution. The *Lampf* opinion did not even mention the *Chevron Oil* case. The opinion did make the unexplained statement in Part IV that it would apply its decision to the parties before the Court, "As there is no dispute that the earliest of plaintiff-respondent's complaints were filed more than three years after Petitioner's alleged misrepresentations, plaintiff-respondents' claims were untimely". (111 S.Ct. at 2782).[12]

In order for *Beam* and *Lampf* to have the effect attributed to them in the opinion below, this Court must have *sub silentio* overruled the long line of cases holding that equitable considerations would be applied to retroactivity issues as they affect shortened statutes of limitations. The opinion below acknowledged this Court's long standing caution "against the retroactive application of shortened statute of limitations when the retroactivity of a shortened statute of limitations would create a time bar to a suit which was timely under the previously applicable statute of limitations". (A-I-5).

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[12] There is no doubt that *Lampf* changed the law on which the parties before the court had relied to their detriment or that the *Lampf* decision overruled clear past precedent. Therefore, the mere application of the decision in *Lampf* to the parties before the court necessarily implicated an analysis of the equities of applying the decision to those parties and other parties "similarly situated". This is a far different case than the Court confronted in *Owens*.

This Court has recognized very recently the importance of *stare decisis* and the importance of the stability of the law to the public acceptance of the role of the federal courts in our democracy. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 60 L.W. 4795 (1992), a plurality opinion was issued. However, Justices O'Connor, Kennedy, Souter, Stevens, and Blackmun joined in Part II and Part III of that opinion which recognized the depth of analysis the court must give to a decision to overrule prior precedent. *Casey* establishes guidelines for such a decision. (60 L.W. at 4801).[15]

One of these guidelines is whether the prior rule "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation". Further defining this "reliance" prong of the *Casey* analysis this Court said, "the enquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continuous application". (60 L.W. at 4801).

Casey teaches that in overruling past precedent on which people have relied reasonably on the continuance of that precedent, this Court *must* take into consideration the effect on those who have so relied. This reaffirms the rule in *Chevron Oil* and its progeny. Such consideration was not possible in *Owens* because there was no party before the Court to advocate the issue. Thus, even if *Beam* and *Lampf* had the effect ascribed to

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[15] These guidelines include whether the rule has proved to be intolerable simply in defying workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed or come to be seen so differently as to have robbed the old rule of significant application or justification. (60 L.W. 4801). None of these guidelines except the equitable considerations fit the line of cases applying equitable considerations where a shortened statute of limitations would bar those who relied on the old rule, and that guideline militates against repudiation.

them in the opinion below, that effect would not and could not implicate *Owens* or this case.

Moreover, the Petitioner's reliance here was twofold: (1) on the law in the Eleventh Circuit prior to *Owens* regarding the applicable statute of limitations and (2) on the application of *Chevron Oil* and its progeny for equitable relief even if *Owens* did implicate the retroactivity issue. The opinion below told the Petitioner that both prongs of his reliance had been snapped off the body of the law, one by a case in which interests similar to his were not represented by any party and the other by a *sub silentio* overruling of a long line of precedents without benefit of the required *Chevron Oil* and *Casey* reliance considerations. Both holdings in the opinion below are in error and because of their nationwide effect on countless § 1983 claimants must be reversed.

CONCLUSION

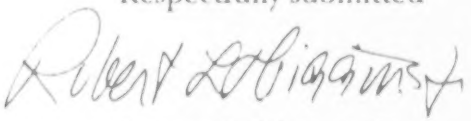
The questions presented by this Petition are far more complex than indicated in the "automatic retroactivity" approach taken in the opinion below. Because of the fact that the several Courts of Appeals often arrive at different conclusions of law regarding applicable state statutes of limitations to federal causes of action and because the effects of a decision of this Court resolving those conflicts will have the result of benefiting some litigants who relied on the prior rule of law and punishing others, decisions such as *Owens* can never be consistent with Article III of the Constitution if they are applied with automatic retroactivity to all litigants. The "case or controversy" rule of Article III requires that absent parties must be at least "similarly situated" to those before the Court in order to be bound by the decision. Otherwise, the decision as to parties not "similarly situated" is a prohibited advisory opinion.

The role of *Chevron Oil* and *Casey* is to provide a means of bridging this gap by providing litigants not "similarly situated" to those before the Court in the paradigm shortened statute of limitations case an opportunity to present their equitable "case

or controversy" for decision. Moreover, *Chevron Oil* and *Casey* allow the courts to comply with Article III of the Constitution by deciding an actual "case or controversy".

The opinion below erroneously construes three important decisions of this Court, *Owens*, *Beam* and *Lampf*, and in the process refutes the teachings of *Casey*. This case must be reversed and this significant area of the law relative to the enforcement of individual rights clarified to guide the lower courts.

Respectfully submitted



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CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing have been served by United States mail, postage prepaid and properly addressed on Ina Leonard, Cindy Waid, Office of General Counsel, University of Alabama - Birmingham, UAB Station - MJH-112, Birmingham, Alabama 35294.

This the 12th day of August, 1992.

Robert L. Wiggins, Jr.

APPENDIX

APPENDIX A-I

LANCE LUFKIN, Plaintiff-Appellant,

v.

CHARLES A. McCALLUM, individually and as President of the University of Alabama in Birmingham; J. A. WOODWARD, individually and as Senior Vice President of the University of Alabama in Birmingham; BLAINE A. BROWNELL, individually and as Dean of the School of Social and Behavioral Sciences of the University of Alabama in Birmingham; JOHN HAMER, individually and as Chairman of the Department of Anthropology of the University of Alabama in Birmingham, Defendants-Appellees.

No. 90-7861.

United States Court of Appeals,
Eleventh Circuit.

March 31, 1992.

Before KRAVITCH, Circuit Judge, GOLDBOLD and JOHNSON*, Senior Circuit Judges.

JOHNSON, Senior Circuit Judge:

Lance Lufkin appeals the district court's dismissal of his section 1983 suit, 752 F.Supp. 421, as untimely. We affirm.

I. STATEMENT OF THE CASE

From 1984 to 1987, the University of Alabama at Birmingham (UAB) employed appellant Lufkin as a temporary lecturer. On May 27, 1987, Lufkin received notice that UAB did not intend to renew his teaching contract. Lufkin believed

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See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

that UAB's nonrenewal of his contract constituted a violation of his property rights under the due process clause of the Fourteenth Amendment. Lufkin consulted with an attorney who advised him that the statute of limitations applicable to his potential section 1983 action was six years. The attorney's legal advice conformed to the then-existing rule regarding the appropriate statute of limitations for section 1983 actions brought in Alabama, which was established two years earlier in *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 474 U.S. 1105, 106 S.Ct. 893, 88 L.Ed.2d 926 (1986) (*Jones I*).[1]

On January 10, 1989, the Supreme Court handed down its decision in *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989). In *Owens*, the Supreme Court rejected the *Jones I* approach to the selection of the proper statute of limitations for section 1983 suits and held that the proper statute of limitations for section 1983 actions is the forum state's general or residual statute of limitations for personal injury actions. *Owens*, 488 U.S. at 236, 249-50, 109 S.Ct. at 574, 581-82. Shortly thereafter, on February 21, 1989, the Supreme Court vacated the decision of this Court in Jones' second appeal to this Court (which had arisen after the remand order in *Jones I*). *Jones v. Preuit & Mauldin*, 489 U.S. 1002, 109 S.Ct. 1105, 103 L.Ed.2d 170 (1989). *See Jones v. Preuit & Mauldin*, 851 F.2d 1321 (11th Cir. 1988) (en banc); *see also Jones II*, 876 F.2d at 1481-82 (setting forth the procedural history of the *Jones* case). The Supreme Court remanded *Jones* to the Eleventh Circuit with directions to reconsider the decision in light of *Owens*. *Jones*, 489 U.S. at 1002, 109 S.Ct. at 1105. On remand, this Court affirmed the district court's grant of summary judgment

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[1] In *Jones I*, this Court determined that the statute of limitations period provided under Alabama law for a trespass to persons should apply to section 1983 actions brought in Alabama. *Jones I*, 763 F.2d at 1256; Ala.Code § 6-2-34(1) (1977). In reaching this conclusion, the *Jones I* Court declined to adopt Alabama's general personal injury statute of limitations. *Id.* at 1254 & 1254 n. 3.

for the defendants. *Jones v. Preuit & Mauldin*, 876 F.2d 1480, 1483-85 (11th Cir. 1989) (en banc) (*Jones II*). The *Jones II* Court rested its holding on the ground that Jones' claim was untimely, ruling that *Owens* precluded the use of the six year statute of limitations provided for a trespass to person or liberty in section 1983 suits brought in Alabama. *Id.* at 1482-83, 1485.

On September 20, 1990, more than three years after the date of the adverse employment decision giving rise to his claim, Lufkin filed a section 1983 action against the appellees, all of whom are present or former UAB officials. Relying on *Owens* and *Jones II*, the appellees asserted a statute of limitations defense, claiming that the applicable limitations periods for Lufkin's section 1983 action was two years.[2] Based on their statute of limitations argument, the appellees filed a motion for dismissal of Lufkin's suit. The district court found that the two year statute of limitations applied to Lufkin's section 1983 suit and that, as a consequence, his suit was untimely. The lower court concluded that Lufkin could not claim the benefit of the six year statute of limitations established in *Jones I* because of the intervening decisions rendered in *Owens* and *Jones II*. The lower court therefore granted the appellees' motion for dismissal. Fed.R.Civ.P. 12(b)(6).

II. ISSUE PRESENTED

This case presents the question of whether the holding in *Owens* should be applied retroactively to bar suits that were timely filed under the statute of limitations established in *Jones I*. Because the Supreme Court's most recent pronouncement on retroactivity dictates that *Owens* be given full retroactive effect, we hold that the lower court properly dismissed Lufkin's suit as untimely. *See James B. Beam Distilling Co. v.*

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[2] Alabama's general statute of limitations for personal injury actions is two years. Ala.Code Ann. § 6-2-38(*l*) (Michie Supp. 1989). *See Owens*, 488 U.S. at 248 & 248 n. 9, 109 S.Ct. at 580 & 580 n. 9; *Jones II*, 876 F.2d at 1483-85.

Georgia, ___ U.S. ___, 111 S.Ct. 2439, 2445-48, 115 L.Ed.2d 481 (1991).

III. ANALYSIS

In *Owens v. Okure*, the Supreme Court held that in section 1983 suits the federal courts are to borrow the "general" or "residual" statute of limitations for personal injuries provided under the law of the state where the court hearing the case sits. *Owens v. Okure*, 488 U.S. 235, 236, 249-50, 109 S.Ct. 573, 574, 580-81, 102 L.Ed.2d 594 (1989). *See* 42 U.S.C.A. § 1988 (1981). In the instant case, that period is two years. *See supra* note 2. The only question before this Court is whether Lufkin's reliance on the six year statute of limitations established in *Jones I* justifies limiting the retroactive application of the two year statute of limitations mandated by *Owens* and explicitly established in *Jones II*.

We begin our analysis of the question before us with the observation that "[j]udicial decisions presumptively apply retroactively to all pending cases." *Foster v. Board of School Comm'rs of Mobile County*, 872 F.2d 1563, 1566 (11th Cir. 1989). Thus, the general rule favors giving new decisions full retroactive effect. Until recently the federal courts had the authority to limit selectively the retroactive effect of new decisions. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-09, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971). However, the Supreme Court revisited the issue of retroactivity during its last term and substantially revised its retroactively jurisprudence. *See James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111, S.Ct. 2439, 115 L.Ed.2d 481 (1991) (*Beam*). The application of *Beam* to *Owens* provides the central issue in this appeal.

Prior to *Beam*, the law of this Circuit clearly supported giving *Owens* only limited retroactive application.[3] *See Kendrick v. Jefferson County Bd. of Education*, 932 F.2d 910, 913 (11th Cir.

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[3] This approach is called "modified" or "selective" prospectivity. *Beam*, 111 S.Ct. at 2444-45.

1991) (holding that the application of the *Chevron Oil* three part test mitigated against the retroactive application of *Owens* to parties that relied on the six year statute of limitations established in *Jones I*); *Kimbrough v. Bowman Transp., Inc.*, 920 F.2d 1578, 1582-83 (11th Cir. (same), *vacated on other grounds*, 929 F.2d 599 (11th Cir. 1991).[4] Thus, this Court recognized that would-be section 1983 plaintiffs had placed legitimate reliance on *Jones I* and also that it would be unfair to hold such plaintiffs' suits barred based on the retroactive application of *Owens*. Because the suits at issue in *McKissick*, *Kendrick* and *Kimbrough* were timely under the statute of limitations in effect when the suits arose, this Court concluded that *Chevron Oil* justified limiting the retroactive effect of *Owens*. *McKissick*, 936 F.2d at 522; *Kendrick*, 932 F.2d at 913; *Kimbrough*, 920 F.2d at 1582-83. Moreover, this approach to the issue of the retroactive application of *Owens* comported with Supreme Court precedents cautioning against the retroactive application of shortened statutes of limitations when the retroactive application of a shortened statute of limitations would create a time bar to a suit that was timely under the previously applicable statute of limitations. *Chevron Oil*, 404 U.S. at 107-09, 92 S.Ct. at 355-56; *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608-09, 107 S.Ct. 2022, 2025-26, 95 L.Ed.2d 582 (1987). *Cf. Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662-64, 107 S.Ct. 2617, 2621-22, 96 L.Ed.2d 572 (1987). We find that *Beam* precludes this Court from continuing the Court's prior practice of limiting the retroactive application of *Owens*.

In *Beam*, a majority of the Court[5] held that if a new rule is applied to the parties in the case in which the rule is an-

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[4] In *McKissick v. Busby*, this Court continued to rely on the *Chevron Oil* analysis to support giving only limited retroactive effect to *Owens*, despite the fact that *Beam* had substantially revised retroactivity doctrine. *McKissick v. Busby*, 936 F.2d 520, 522 (11th Cir. 1991).

[5] Although Justice Souter's plurality opinion was joined only by Justice Stevens, *Beam*, 111 S.Ct. at 2441, two concurrences joined by Justices Blackmun, Marshall, and Scalia create a five member majority for the proposition that modified prospectivity is not permissible. *Id.* at 2449-50

nounced,[6] then the rule must be applied retroactively to all cases currently pending. *Beam*, 111 S.Ct. at 2445-46. "[T]he question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equity and *stare decisis* here prevailing over any claim based on a *Chevron Oil* analysis." *Id.* at 2446.

Although equitable considerations would favor limiting the retroactive effect of *Owens*, the Supreme Court in *Beam* has expressly considered and rejected the use of equitable considerations as a basis for limiting the retroactive effect of a new decision (except, perhaps, in the new decision itself):[7]

> Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity; whether they actually relied on the old rule and how they would suffer from the retroactive application of the new.
>
> . . . . .
>
> [O]ur decision here does limit the possible applications of the *Chevron Oil* analysis. . . . Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to all others, the *Chevron Oil* test

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(Blackmun, J., concurring); *id.* at 2450-51 (Scalia, J., concurring). Justice White also filed a concurrence that supports the proposition that a new decision may not be given partial retroactive effect. *Id.* at 2448-49. Thus, although no single opinion was joined by five members of the Court, the Court's holding is nevertheless quite clear. *See, e.g., Anixter v. Home-Stake Production Co.*, 947 F.2d 897, 899 (10th Cir. 1991) (applying *Beam*); *Welch v. Cadre Capital*, 946 F.2d 185, 197-88 (2d Cir. 1991) (same).

[6] For purposes of applying *Beam*, we hold that *Owens* created a "new rule." *See Owens*, 488 U.S. at 239-241, 109 S.Ct. at 576-77.

[7] Under the view held by six members of the Court, it is possible that a decision may have purely prospective application. *Beam*, 111 S.Ct. at 2448. Justice Souter's opinion expressly declined to decide the question of whether giving a decision completely prospective effect is permissible, *see id.*, although Justices Blackmun, Marshall, and Scalia reject the possibility. *See id.* at 2451 (Scalia, J., concurring).

> cannot determine the choice of law by relying on the equities of the particular case. Once retroactive application is chosen for any assertedly new rule, it is chosen for all other who might seek its prospective application.

Beam 111 S.Ct. at 2447-48 (citations omitted).

Although the application of equitable principles to vindicate Lufkin's reliance on *Jones I* might well have been warranted prior to *Beam*, *see Chevron Oil*, 404 U.S. at 106-07, 92 S.Ct. at 355-56, for better or worse, such principles no longer apply to cases such as this one. *See id.* 111 S.Ct. at 2445-47; *id.* at 2450.

Under *Beam*, the dispositive question in the case before us (indeed, the sole question before us) is whether the *Owens* Court applied its new rule to the parties in the *Owens* case. *Beam*, 111 S.Ct. at 2445-46. It is obvious that the *Owens* Court did apply the new rule announced in *Owens* to the parties in the *Owens* case. *Owens*, 488 U.S. at 249-51, 109 S.Ct. at 581-82. Applying *Beam*, the *Owens* rule must be given full retroactive effect. *Beam*, 111 S.Ct. at 2445-47; *id.* at 2450.

In light of *Beam*, this panel declines to follow this Court's prior precedents that suggest *Owens* is not to be given full retroactive effect. *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986). A panel of this Court may decline to follow a decision of a prior panel if such action is necessary in order to give full effect to an intervening decision of the Supreme Court of the United States. *Id.* *McKissick*, *Kendrick*, and *Kimbrough* all relied on the retroactivity analysis established in *Chevron Oil*, however, in *Beam*, a majority of the Supreme Court has disallowed applying *Chevron Oil* to cases such as this one, where the new rule was applied in the same case in which it was announced. *Beam*, 111 S.Ct. at 2445-51. *See McKissick v. Busby*, 936 F.2d at 522; *Kendrick v. Jefferson County School Bd. of Education*, 932 F.2d at 913; *Kimbrough v. Bowman Transp., Inc.*, 920 F.2d at 1582-83; *see also Lampf, Pleva, Lipkind, et al. v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 2782, 115 L.Ed.2d 321 (1991) (announcing and applying a new and shorter statute of

limitations to bar a claim where the plaintiffs may have relied on the previous statute of limitations) (*Lampf*). *But cf. id.* 111 S.Ct. at 2785-87 (O'Connor, J., dissenting).

Finally, the fact that a statute of limitations is at issue does not in any way modify the application of *Beam*. In *Lampf*, the Supreme Court modified the statute of limitations applicable to securities suits brought under section 10(b) and rule 10b-5, and chose to apply the new statute of limitations retroactively.[8] *Lampf*, 111 S.Ct. at 2781-82.[9] *See also Anixter v. Home-Stake Prod. Co.*, 947 F.2d at 899; *Welch v. Cadre Capital*, 946 F.2d at 187-88. *Lampf* was decided the very same day as *Beam*, and it is inconceivable that the Court's retroactive application of the new rule announced in *Lampf* was accidental. *See Lampf*, 111 S.Ct. at 2782; *id.* at 2786-87 (O'Connor, J., dissenting). *See also Welch v. Cadre Capital*, 946 F.2d at 197-98. Thus, there is no basis to support a holding by this Court that the *Beam* retroactivity analysis does not apply with full force when a retroactive change in a statute of limitations period is at issue. Consequently, Lufkin's suit was subject to the two year statute of limitations mandated by *Owens* and confirmed by *Jones II*. Because Lufkin did not file his suit until after the applicable statute of limitations period had run, the lower court's dismissal was proper.[10]

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[8] Theoretically, the *Lampf* Court could have limited the application of the revised statute of limitations to cases arising after the *Lampf* decision. *See supra*, note 7.

[9] In dissent, Justice O'Connor noted that the Court's action effectively changed the statute of limitations without warning, and that this change was fundamentally unfair. *Id.* 111 S.Ct. at 2786-87 (O'Connor, J., dissenting).

[10] Appellant Lufkin urges this Court to apply Alabama state law regarding the application of changes in a statute of limitations. Citing *Wilson v. Garcia*, Lufkin makes the unobjectionable observation that if it is necessary to borrow a state law statute of limitations pursuant to section 1988 of Title 42, then this Court should also borrow the state's rules regarding the application of the statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 269, 105 S.Ct. 1938, 1943, 85 L.Ed.2d 254 (1985). Appellant then urges this Court to follow Alabama law on changes in a statute of limitations. Appellant claims that under Alabama law his suit would be timely. *Henry v. Thorpe*, 14 Ala. 103

CONCLUSION

The order of the lower court dismissing Lufkin's claim is AFFIRMED.

(1848). *See also United States Veterans Administration v. Walker*, 356 So.2d 631, 633-34 (Ala. 1978).

On the facts of this case, however, we find that recourse to Alabama law is entirely unwarranted. Section 1988 authorizes the federal courts to "borrow" state law to fill in any gaps in federal law when adjudicating civil rights claims. When federal law does not provide a necessary decisional principle, "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . " 42 U.S.C.A. § 1988 (1981). Borrowing pursuant to section 1988 occurs, however, only when federal law does not provide a necessary decisional rule. *See Wilson v. Garcia*, 471 U.S. at 268-69, 105 S.Ct. at 1943-44. "[R]esort to state law . . . should not be undertaken before the principles of federal law are exhausted." *Id.* at 268, 105 S.Ct. at 1943. Here, federal law provides the relevant decisional rules for the application of *Owens*. *See Beam*, 111 S.Ct. at 2445-51; *Lampf*, 111 S.Ct. at 2782. Consequently, there is no cause for resort to Alabama law regarding changes in a statute of limitations. *See Wilson v. Garcia*, 471 U.S. at 268-69, 105 S.Ct. at 1942-43. *Cf Jones II*, 876 F.2d at 1484; *McKissick*, 936 F.2d at 521.

APPENDIX A-II

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LANCE LUFKIN,	)	
	)	
Plaintiff	)	CIVIL ACTION NO.
	)	
VS.	)	90-AR-1979-S
	)	
CHARLES A. McCALLUM, ET AL.,	)	
	)	
Defendants	)	
	)	

ORDER

In accordance with the accompanying memorandum opinion, the above-entitled action is hereby DISMISSED with prejudice.

Costs are taxed to plaintiff.

DONE this 9th day of November, 1990.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LANCE LUFKIN,	)	
	)	
Plaintiff	)	CIVIL ACTION NO.
	)	
VS.	)	90-AR-1979-S
	)	
CHARLES A. McCALLUM, ET AL.,	)	
	)	
Defendants	)	
	)	

MEMORANDUM OPINION

This court has for consideration a motion to dismiss pursuant to Rule 12(b)(6), F.R.Civ.P., filed by defendants, Charles A. McCallum, et al.

UNDISPUTED PERTINENT FACTS

Plaintiff, Lance Lufkin, was appointed as a temporary lecturer at the University of Alabama in Birmingham for the academic year 1984-85. He secured subsequent appointments for the 1985-86 and 1986-87 academic years. On either May 27, 1987 or May 29, 1987, Lufkin received written notice of his non-reappointment. After he complained that the written notice did not conform to U.A.B. policies, defendants, Charles A. McCallum, J.A. Woodward, and Blaine Brownell, officials of U.A.B. with decisional authority in this area, refused to overturn Lufkin's non-reappointment.

Within a short period after the written notice, Lufkin consulted with an attorney, who informed him that the appropriate statute of limitations for a 42 U.S.C. §1983 claim arising in Alabama was six years. At that time this legal advice conformed to what the Eleventh Circuit two years earlier had said

in *Jones v. Preuit & Mauldin*, 763 F.2d 1220 (11th Cir. 1985). On September 20, 1990 (almost three years and four months after the adverse employment decision out of which this complaint arises), Lufkin filed his §1983 action.

CONCLUSIONS OF LAW

Because the issue is dispositive, the court will address only one of defendants' Rule 12(b)(6) issues, namely, their statute of limitations defense. Defendants claim that the applicable statute of limitations for § 1983 actions in Alabama is two years, and therefore that Lufkin's complaint is time barred.

The Supreme Court in *Owens v. Okure*, ___ U.S. ___, 109 S.Ct. 573 (1989), clarified *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938 (1985), and held that §1983 claims are governed by a state's general or residual statute for personal injury actions. *Id.* at 582. The Supreme Court thereafter vacated *Jones v. Preuit & Mauldin*, *supra*, and remanded the case to the Eleventh Circuit for reconsideration in the light of *Owens*. *See* ___ U.S. ___, 109 S.Ct. 1105 (1989). The Eleventh Circuit in *Jones v. Preuit & Mauldin*, 876 F.2d 1480 (11th Cir. 1989), then followed *Owens* and held that the two years limitations period of Ala. Code § 6-2-38(1) applies to § 1983 actions in Alabama. *Id.* at 1483. Thus, *Owens*, in effect, corrected what the Eleventh Circuit had erroneously said in *Preuit & Mauldin I*. The only question which this court now faces is whether or not to deny so-called "retroactive" effect to *Owens* and *Preuit & Mauldin II*. The court finds that the limitations period established by *Owens* and *Preuit & Mauldin II* should be enforced here, whether the application is described as "retroactive" or simply as a recognition of the original intent of the Supreme Court in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938 (1985), decided prior to Lufkin's obtaining his legal advice.

The general rule here applicable is that cases are to be decided in accordance with the law existing at the time of the decision. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16, 101 S.Ct. 2870, 2979 n.16 (1981). This even includes

employing binding judicial decisions which occur during the pendency of the case in which the new decision is being applied. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662, 107 S.Ct. 2617, 2622 (1987). Here, of course, *all* pertinent decisions were handed down either by the Supreme Court or by the Eleventh Circuit *prior* to the filing of Lufkin's complaint. Nothing important has changed thereafter.

An exception to the general rule of retroactive application provides a three-prong test for determining whether or not a court should treat a particular decision simply as representative of the law as it pre-existed the pending case or as a new wrinkle which should only have prospective effect. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971). These considerations include: (1) whether the judicial decision established a new legal principle by overruling clear past precedent which litigants could reasonably have relied upon; (2) whether retroactive application would enhance or inhibit the purpose behind the decision's rule; and (3) whether retroactive application would be inequitable. 92 S.Ct. at 355.

Defendants in the present case strangely concede that *Owens* and *Preuit & Mauldin II* overruled past precedent, but their concession is erroneous. A check of the law books in 1987 would have revealed that *Preuit & Mauldin* was still a pending case when the alleged constitutional tort here complained of was committed. Lufkin argues that he was entitled to rely upon *Preuit & Mauldin I*. Not only did the Eleventh Circuit itself apply *Owens* retroactively in *Preuit & Mauldin II*, but when *Preuit & Mauldin I* was *vacated*, it was as if it never existed. It is not as if the applicable statute of limitations changed *between* cases. *Preuit & Mauldin I* and *Preuit & Mauldin II* came from the *same* case, and, as is generally understood, "It's not over until it's over!"

Although defendants made an unnecessary concession as to the first *Chevron* factor, they correctly argue that the other two *Chevron* factors here mandate the retroactive application of *Owens*. First, a retroactive application would help to establish

and to maintain a uniform limitations period for § 1983 actions, the purpose behind *Owens*. Defendants are also correct when they say that retroactive application would not be inequitable in this case. When *Owens* was decided on January 10, 1989, Lufkin still had five months within which to file his complaint under the *Owens* two-year statute of limitations. Thus, this is not a case in which the decision to be applied retroactively totally eliminated Lufkin's chances to present his claim. Lufkin and his lawyer may have been disappointed by the recognition of a shorter statute of limitations period than they thought existed, but Lufkin was not thereby denied reasonable access to this court. He must be deemed to have known about *Owens*, after which he had five months to meet the *Owens* deadline. Therefore, it is not inequitable to apply *Owens* retroactively to Lufkin's action.

Neither plaintiff nor defendants cite *Foster v. Bd. of Sch. Com'rs of Mobile City, Ala.*, 872 F.2d 1563 (11th Cir. 1989), or *Free v. Granger*, 887 F.2d 1552 (11th Cir. 1989). *By necessary implication*, the Eleventh Circuit in *Free* found *Owens* and *Preuit & Mauldin II* to be applicable retroactively. Although the question of retroactive application was not discussed in *Free*, it is clear that the cause of action there would not have been barred if the six-year statute of limitations (temporarily recognized in *Preuit & Mauldin I*) had been applied. Of greater interest is *Foster*, which did discuss "retroactivity", together with *Preuit & Mauldin*, but it dealt with whether to apply *Preuit & Mauldin II* retroactively. Using the *Chevron* analysis, the Eleventh Circuit in *Foster* found that the six-year statute in *Preuit & Mauldin I* should *not* be made available retroactively to provide a longer statute of limitations than *Owens* provides. This was virtually the same thing, if not the same thing, as saying that the two-year statute in *Preuit & Mauldin II* should be applied retroactively.

Closely on point is *Wycoff v. Menke*, 773 F.2d 923 (8th Cir. 1985), in which the Eighth Circuit applied *Wilson v. Garcia* retroactively to bar a § 1983 action which would not have been barred under prior Eighth Circuit precedent. The rationale

was that the limitations issue was sufficiently unsettled so that plaintiff was provided no justification for relying on shaky precedent. This rationale readily applies to Lufkin's situation.

Whether what this court is doing can be properly described in giving *Preuit & Mauldin II* "retroactive effect" or as simply recognizing that *Preuit & Mauldin I* was never final and was subject to being vacated so that it never guaranteed Lufkin a six-year statute of limitations, is, perhaps, an academic question. Either way, the result is the same.

CONCLUSION

For the foregoing reasons, Lufkin's claim for relief is untimely and is due to be dismissed.

An appropriate, separate order will be entered.

DONE this 9th day of November, 1990.

/s/ William M. Acker, Jr.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX A-III

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Code of Alabama, 1975, § 6-2-38. Same — Two years.

(a) An action by a representative to recover damages for wrongful act, omission or negligence causing the death of the decedent under sections 6-5-391 and 6-5-410 must be commenced within two years from the death.

(b) All actions by common carriers of property subject to chapter 3 of Title 37 for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues and not after.

(c) For recovery of charges, action shall be begun against common carriers of property by motor vehicles subject to this article within two years from the time the cause of action accrues and not after, except as provided in subsection (d) of this section; provided, that if claim for the overcharge has been presented in writing to the carrier within the two year period of limitation, said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before the expiration of the two-year period of limitation in subsection (c) of this section, a common carrier by motor vehicle subject to chapter 3 of Title 37 begins action under subsection (c) of this section for recovery of charges in respect of the same transportation service or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include 90 days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purpose of subsections (b) through (f), of this section be deemed to accrue upon delivery or tender of delivery thereof by the carrier and not after.

(f) The tern "overcharges" as used in subsections (b) through (e) of this section shall be charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the public service commission.

(g) Any action brought under section 25-5-11(b) must be brought within two years of such injury or death.

(h) All actions for malicious prosecution must be brought within two years.

(i) All actions for seduction must be brought within two years.

(j) All actions qui tam or for a penalty given by statute to the party aggrieved, unless the statute imposing it prescribes a different limitation, must be brought within two years.

(k) All actions of libel or slander must be brought within two years.

(l) All actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years.

(m) All actions for the recovery of wages, overtime, damages, fees or penalties accruing under laws respecting the payment of wages, overtime, damages, fees and penalties must be brought within two years.

(n) All actions commenced to recover damages for injury to the person or property of another wherein a principal or

master is sought to be held liable for the act or conduct of his agent, servant or employee under the doctrine of respondeat superior must be brought within two years.

(o) All actions commenced under section 6-5-411 to recover damages for injury or damage to property of a decedent must be brought within two years.

(p) If any action is commenced before the time limited has expired, judgment is entered for the plaintiff and such judgment is arrested or reversed on appeal, the plaintiff or his legal representative may commence an action again within one year from the reversal or arrest of such judgment though the period limited may in the meantime have expired; and in like manner, if more than one judgment is arrested or reversed, an action may be recommended within one year. (Code 1896, § 2800; Code 1907, § 4839; Code 1923, § 8948; Code 1940, T. 7, § 25; Acts 1953, No. 760, p. 1022, §§ 1-4; Acts 1984, 2nd Ex. Sess., No. 85-39, p. 40, § 1.)

Code of Alabama, 1975, § 6-2-34. Same — Six years.

The following must be commenced within six years:

(1) Actions for any trespass to person or liberty, such as false imprisonment or assault and battery;

(2) Actions for any trespass to real or personal property;

(3) Actions for the detention or conversion of personal property;

(4) Actions founded on promises in writing not under seal;

(5) Actions for recovery of money upon a loan, upon a stated or liquidated account or for arrears of rent due upon a parol demise;

(6) Actions for the use and occupation of land;

(7) Motions and other actions against the sureties of any sheriff, coroner, constable or any public officer and actions against the sureties of executors, administrators or guardians for any nonfeasance, misfeasance or malfeasance, whatsoever, of their principal, the time to be computed from the act done

or omitted by their principal which fixes the liability of the surety;

(8) Motions and other actions against attorneys-at-law for failure to pay over money of their clients or for neglect or omission of duty; and

(9) Actions upon any simple contract or specialty not specifically enumerated in this section. (Code 1852, § 2477; Code 1867, § 2901; Code 1876, § 3226; Code 1886, § 2615; Code 1896, § 2796; Code 1907, § 4835; Code 1923, § 8944; Code 1940, T. 7, § 21.)